Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AIRMAN FIRST CLASS SAMUEL T. HELMS II,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

Thomas R. Uiselt
Captain, United States Air Force
Appellate Defense Counsel
Counsel of Record

Douglas H. Kohrt
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20332–8000
202–767–1562

October 1997

QUESTION PRESENTED

Whether Petitioner's Due Process rights were violated when he was convicted of larceny of basic allowances for quarters (BAQ) and overseas housing allowance (OHA) payments even though he took no affirmative step to take, obtain or withhold the allowances from the United States.

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The petitioner, Airman First Class Samuel T. Helms II, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 28 August 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Helms,* 47 M.J. 1 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals, *United States v. Helms,* ACM 31250 (A.F. Ct. Crim. App., 6 June 1996) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on 28 August 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (West Supp. 1996) and 10 U.S.C. § 867(a)(3) (West Supp. 1996).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States provides, in relevant part:

> "No person shall . . . be deprived of life, liberty, or property, without due process law . . ."

STATEMENT OF THE CASE

On 29-30 March 1994, appellant was tried by a general court-martial consisting of military judge sitting alone. Contrary to his pleas, petitioner was convicted of larceny of about $11,000 of basic allowance for quarters (BAQ) and overseas housing allowance (OHA) in violation of Article 121

of the Uniform Code of Military Justice. He was acquitted of dishonorably failing to pay an overpayment of about $11,000 of the same BAQ and OHA.

Appellant was sentenced to a bad conduct discharge, ten months confinement, reduction to airman basic and a reprimand. On 1 July 1994, the convening authority approved the findings and sentence as adjudged. On 6 June 1996, the Air Force Court of Criminal Appeals affirmed. Appendix A. On 28 August 1997, the Court of Appeals for the Armed Forces affirmed the decision of the Air Force Court of Criminal Appeals. Appendix B.

A1C Helms and his wife arrived at Rhein-Main AB, Germany in the summer of 1992 when he was authorized to live in off base, 'economy' housing and thus receive Basic Allowance for Quarters (BAQ) and Overseas Housing Allowance (OHA). He applied for and began receiving BAQ and OHA in July 1992. Pros Exh 1, para 2. OHA is a military entitlement as are BAQ and VHA. See Pros Exh 1–5. In October 1992, A1C Helms applied for government housing and moved into it at the end of December 1992. This terminated his eligibility for BAQ and OHA. Pros Exh 1, 6–12. However, A1C Helms' servicing Accounting and Finance Office failed to terminate BAQ/VHA payments and he received them until the time of his out-processing in October 1993. Pros Exh 1, para 8, Pros Exh 14–15.

A1C Helms followed the standard procedures in applying for on base housing and filled out all related paperwork honestly and correctly. It was the duty of the Wiesbaden Housing Office to prepare and send documentation of A1C Helms' change of status to the Lindsey Air Station Accounting and Finance Office in turn was required to send it to the Rhein-Main Accounting and Finance Office which was responsible for terminating the BAQ/OHA payments to A1C Helms. One of these offices at one of these

facilities failed to carry out their part and the payments were never stopped. Pros Exh 1, para 7, Pros Exh 13. A1C Helms continued to receive the payments through no fault of his own. Even if, at some date during the charged period, A1C Helms or his wife may have suspected that he was being overpaid, as the government attempted to show at trial and the Air Force Court assumed in its opinion (*Helms, slip. op.* at 3), at most, this should have supported a charge of dereliction of duty—not larceny. *See United States v. Antonelli,* 37 MJ 932, 938, n. 14 (A.F.C.M.R. 1993).

In any case, the Air Force did not discover this error until A1C Helms reported to Accounting and Finance at Rhein-Main as part of out-processing and the clerk, Sgt Enlow, asked about A1C Helms' housing status. A1C Helms answered honestly and told him he was in government housing. Sgt Enlow saw that A1C Helms had been receiving BAQ/VHA for the whole period. He terminated payments and informed A1C Helms that the overpayment would have to be recouped. By the time of trial, Accounting and Finance had recouped about $5,200 of the approximately $ 11,000 owed. Pros Exh 1, para 8.

REASON FOR GRANTING THE PETITION

The test for legal sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Prior to this case, the issue regarding larceny under Article 121 of the Uniform Code of Military Justice most recently received the attention of the Court of Appeals for the Armed Forces in *United States v. Antonelli,* 43 MJ 183 (1995). Senior Airman Antonelli's ex-wife, at the time of their divorce in

1975, obtained a child support order for their daughter. Based upon this, Antonelli qualified for and received Basic Allowance for Quarters (BAQ) and Variable Housing Allowance (VHA) at the 'with dependent' rate. However, his daughter had received no money from him since 1977, nor had she ever resided with him subsequent to the divorce. On 4 November 1987, Antonelli signed a form recertifying that he was providing support for his daughter which allowed him to continue to receive BAQ and VHA at the with dependent rate. An investigation was initiated in 1989 and Antonelli was charged with false official statement and larceny of the with dependent rate BAQ and VHA and convicted of both offenses in 1990. The larceny alleged included some of the period prior to the false recertification in 1987. The prosecution relied upon the theory of false withholding for the period leading up to the false recertification on 4 November 1987. *Antonelli,* 37 MJ at 933–934.

The Air Force Court overturned the conviction for the period prior to the false recertification finding that these facts did not establish wrongful withholding. *United States v Antonelli,* ACM 28856, (A.F.C.M.R. 19 April 1991). The government appealed and the then Court of Military Appeals remanded the case for the Air Force Court to determine whether a wrongful withholding might be established from a bailment or wrongful conversion. *United States v. Antonelli,* 35 MJ 122 (C.M.A. 1992). The Air Force Court reexamined this area and again concluded that larceny was not established with these facts and sent it back to the Court of Military Appeals. *Antonelli,* 37 MJ 932 (A.F.C.M.R. 1993). The Court of Military Appeals, in its subsequent review of the case, found that the Air Force Court failed to correctly follow its guidance in its earlier opinion and remanded it yet again. *Antonelli,* 43 MJ 183. The Air Force Court finally affirmed Antonelli's larceny conviction for the entire period charged, in its last opinion on the case (unpublished) on 19 January 1996. Appendix C.

In reaching its conclusion in *Antonelli,* the Court of Military Appeals required the Air Force Court to make its legal sufficiency review in the crucial light of Antonelli's false recertification.

> [E]ven if one hypothetically accepts the proposition that a servicemember who accepts found money and who does nothing to correct the continued cash flow is not criminally liable (a proposition that we do not reach in this appeal, *but cf. United States v. Antonelli,* 35 MJ at 130–131 (Crawford, J. concurring in the result)), any *affirmative* action either to ensure the inappropriate continuation of the elevated allowances or to mislead officials in a way so as to co-opt a recoupment has more than civil-indebtedness ramifications.

Antonelli, 43 MJ at 185 (emphasis in original). The Court of Military Appeals, in *Antonelli, supra,* apparently left open the question of whether an individual who receives BAQ type payments as a result of some error, not as a result of an affirmative act on his part, can be found guilty of larceny.

In the appellant's case, at no time did he falsify any document or otherwise lie about his status or take any other affirmative act to ensure that the erroneous payments would continue. To the contrary, he carried out all actions as directed and when asked about his housing status, he responded honestly. It was the failure of one of the offices involved in this unusually complicated bureaucratic chain (at a time when at least one of the facilities was in the process of closing down) that caused the payments to continue, not A1C Helms.

On 6 June 1996, the Air Force Court when next addressing this issue in the appellant's case, decided that A1C Helms was aware of the overpayment and found his failure to come forward to stop the payments "an affirmative action designed to ensure the continuation of the allowances which

he was not entitled to receive." *Helms, slip op* at 3. They thus found the facts legally and factually sufficient.

However, both the Navy-Marine Corps and Army Courts of Criminal Appeals have addressed this issue since *Antonelli, supra,* and both have come to different conclusions than that of the Air Force Court.

The Army Court of Criminal Appeals addressed this issue in *United States v. Sundeen,* 45 MJ 508 (Army Ct. Crim App 1996). Sundeen pled guilty to being absent without authority and wrongful appropriation of "excess pay." Sundeen had pay problems that repeated visits to various finance offices did not resolve. He set up direct pay deposits to a local bank (it had been going to another out of state bank) in an effort to correct these pay errors and was soon receiving basic pay in both accounts, i.e. basic pay overpayments. During his plea providency inquiry, Sundeen admitted that he "suspected" that he was being overpaid but did not know by how much. However, there was no evidence that Sundeen "made any affirmative *misrepresentations,* made untrue certifications, or took deceptive actions designed to create or perpetuate the payroll overpayments. In all his dealings with finance officials, appellant appeared open and forthright about his situation." *Sundeen,* 45 MJ at 510.

The Army Court summarized the relevant case law governing larceny as follows:

> As drafted, Article 121, UCMJ, combined several property offenses, one of which was embezzlement (wrongful withholding-type larcenies). "When testing whether an offense of wrongful withholding has been . . . providently pleaded to, we search for two factors . . . (1) a fiduciary relationship; and, (2) an initial lawful possession." A fiduciary relationship exists, and includes the legal duty to return or deliver to the owner entrusted property,

> when such a return or delivery is due or demanded. (*citations omitted.*)
>
> As a general rule, no inherent legal duty to account for erroneously transferred property exits. Even if the recipient is aware of the error, absent a specific, identifiable fiduciary relationship, such circumstances involve no criminality and cannot support a guilty plea to wrongful appropriation as a matter of law. (*citations omitted.*)
>
> An exception to this general rule involves accepting increased allowances on behalf of one's dependents. However, *Antonelli* specifically distinguishes allowances from salary, and that precedent does not extend to erroneous overpayments of basic pay. (*citations omitted.*)

Sundeen, 45 MJ at 510–11.

The Army Court, after the above extensive analysis of the Congressional intent, case law history and resultant requirements of wrongful withholding, found that there has to be an underlying fiduciary relationship. The Army Court went on to interpret the holdings in *Antonelli* to mean that when the government pays a member increased allowances for the benefit of dependents—this creates just such a fiduciary relationship. Thus, the Army Court found that a member can be found guilty of wrongful withholding and thus larceny of funds paid for the support of dependents even if there is no affirmative act on the part of a member. However, where the money paid is for the benefit of the member, i.e. here base pay or as the Navy Court found with housing allowances, there can be no guilt of larceny without an affirmative act, e.g. a false recertification.

Prior to the Air Force Court's decision in the appellant's case, but after the Court of Military Appeals' decision in *Antonelli, supra,* the Navy-Marine Corps Court of Criminal

Appeals reviewed the same fact pattern and came to the opposite conclusion than that of the Air Force Court in *United States v. Gray,* 44 MJ 585 (NMC Ct. Crim App 1996).

Seaman Recruit Gray, as did A1C Helms, moved his household and became ineligible to receive further BAQ/VHA payments. As in A1C Helms' case, in *Gray* "the government's evidence in the appellant's case indicates that the housing office had primary responsibility for reporting the changed circumstances to the appellant's command" and that although Seaman Gray knew about the overpayments and remained silent while receiving the extra pay he took no affirmative action "to ensure the inappropriate continuation of the overpayment or to mislead of officials in a way as to co-opt a recoupment." *Gray,* 44 MJ at 587 (citing *Antonelli, supra*). The Navy Court found that "the appellant's passive conduct, although it may have ramifications relating to dereliction of a duty by omission, does not rise to the same level of criminality as would more affirmative action," i.e. these facts were **not** sufficient to establish guilt of larceny. *Gray,* 44 MJ at 588.

Obviously, this area of law has proven difficult for the courts to interpret and thus appellate guidance to trial level practitioners has not been clear.[1] In fact, the service courts have examined the precedent of the Court of Appeals for the Armed Forces and have arrived at at opposite results.

The Navy and the Army Courts of Criminal Appeals' decisions are consistent with each other as well as the precedent of the Court of Appeals for the Armed Forces. The

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[1]Judge Crawford suggests that a solution to the time consuming and apparently confusing historical analysis this issue has generated would simply be to find that Congress intended military courts to apply the "clear language" of the statute, i.e. applying the plain meaning of the words rather than look to the historical context of the decision to generate the statutory language. *See,* J. Crawford's concurrence in the result in *Antonelli,* 35 MJ at 130.

'Army/Navy Rule' is that there can be no larceny of overpayments of pay or entitlements even where the accused is aware of overpayment (unless delivered for the benefit of a dependent and not forwarded to that dependent by the accused, i.e. *Antonelli's* situation) absent some wrongful, affirmative act. *Gray, supra; Sundeen, supra.*

To the contrary are the unpublished *Helms* opinion from one panel of the Air Force Court and the Court of Appeals for the Armed Forces' decision which affirmed the Air Force Court's decision. The Air Force Court in this case found that where an accused knows or suspects there were overpayments of housing allowances (where no issue regarding support of dependents is involved), his or her failure to act is "an affirmative action designed to ensure the continuation of the allowances which he was not entitled to receive." *Helms, slip op* at 3. Therefore, he can be found guilty of larceny. The Court of Appeals for the Armed Forces held that "once a service member realizes that he or she is receiving pay or allowances and forms the intent to steal that property, the servicemember has committed larceny." *Helms, slip op* at 8. The Court found that appellant realized he was mistakenly receiving housing allowances and formed an intent to steal it.

CONCLUSION

The more better reasoned approach to this issue is that adopted by the Army and Navy Courts: absent a fiduciary duty such as that created where a member is given payments provided specifically for the support of dependents (*Antonelli, supra*), there is no larceny of overpayments of pay and allowances absent some affirmative misdeed, e.g. false recertification, on the part of an accused. This rule does not prohibit the government from prosecuting, for dereliction of duty, someone who finds themselves in Gray's or Helms' position—in possession of an erroneously produced

overpayment windfall, provided the prosecution can prove knowledge of the overpayment. Nor does it prohibit the government from prosecuting someone in Gray's or Helms' position for dishonorable failure to pay a just debt once the overpayment is identified and the member is notified of the debt owed to the United States and given a reasonable opportunity to repay (as was done in the appellant's case and he was acquitted). This rule merely prevents the government from prosecuting a member under a theory of larceny where the accused has taken no wrongful affirmative action, but in spite of this, has come into the possession of a windfall through no fault of his or her own—but rather to the fault of the United States.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS R. UISELT
Captain, United States Air Force
Appellate Defense Counsel
Counsel of Record

DOUGLAS H. KOHRT
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel for Petitioner

Air Force Legal Services Agency
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB DC 20332-8000
(202) 767-1562

Appendix A

United States, Appellee

v.

Samuel T. HELMS, II, Airman First Class

U. S. Air Force, Appellant

No. 96–1167

Crim. App. No. 31250

United States Court of Appeals for the Armed Forces

Argued April 9, 1997

Decided August 28, 1997

Counsel

For Appellant: *Major Ormond R. Fodrea* (argued); *Lieutenant Colonel Kim L. Sheffield* (on brief); *Colonel Jay L. Cohen.*

For Appellee: **Captain Mitchel Neurock** (argued); *Colonel Theodore J. Fink* (on brief); *Major LeEllen Coacher.*

Military Judge: Bruce T. Brown

Opinion of the Court

CRAWFORD, Judge:

A military judge sitting as a general court-martial at Rhein-Main Air Base, Germany, found appellant guilty of larceny of military property, in violation of Article 121, Uniform Code of Military Justice, 10 USC § 921. The convening authority approved the sentence of a bad-conduct discharge, confinement for 10 months, reduction to the lowest enlisted grade, and a reprimand. The Court of Criminal

Appeals affirmed the findings and the sentence in an unpublished opinion.

We granted review of the following issue:

WHETHER THE FACTS ARE LEGALLY SUFFICIENT TO SUPPORT A CONVICTION OF LARCENY OF BAQ AND OHA PAYMENTS.

We hold that the facts are legally sufficient to support appellant's larceny conviction under the standard established in *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

FACTS

On assignment in Germany, appellant lived off base and received a basic allowance for quarters (BAQ) and an overseas housing allowance (OHA). He subsequently requested a move into government quarters. Standard procedure was for the housing representative to process the paperwork to stop the housing allowances. For some reason, appellant's housing allowances did not end when he entered government housing. Despite his move to on-base housing, appellant continued to receive both BAQ and OHA for 11 months. He was overpaid more than $11,000.

At trial, Sergeant (Sgt) Sykes, the NCOIC of Customer Service in the Accounting and Finance Office, testified that she saw appellant's wife at a track meet during the summer of 1993 and that appellant's wife said "her husband felt that they were being overpaid" for housing. According to Sgt Sykes, appellant was present during part of this conversation, and she advised him to stop by her office to find out if he was being overpaid. She testified as follows:

> A. I told Airman Helms that I needed him to come in so I could verify if he was, in fact, being overpaid; how much he was being overpaid; and

at that point, I could figure out a repayment schedule so that it wouldn't put him into much of a financial bind.

Q. What, if anything, did he say to you when you tell [sic] him this?

A. He said, "Okay."

Q. Did he indicate to you when he would follow up with repaying these overpayments?

A. No. He didn't indicate when. My statement was that when we got back, that he should come in and see me and then we could figure out a way to repay.

Q. Did either Airman Helms or his wife ever come in to see you?

A. No.

Appellant's wife testified that she took over the family financial matters when they moved into government quarters. She stated that appellant never saw his leave and earnings statements and that she took care of paying all of the bills. Mrs. Helms acknowledged that she had a conversation with Sgt Sykes about a possible overpayment but contended that appellant was standing about 75 feet away from them during the conversation. Mrs. Helms testified that she may not have remembered to tell appellant to go to the finance office as Sgt Sykes had directed.

Appellant's continued receipt of housing allowances was discovered when he began providing information for a recertification form while preparing to separate from the Air Force. Appellant informed the separation and retirement technician, Sgt Enlow, that he was living in government housing. Sgt Enlow discovered that appellant had been receiving housing allowances and told appellant that he had

been overpaid and would have to repay the money or put in a request for a waiver. Appellant did not seem surprised by the news and made no comment. Sgt Enlow then asked appellant how he would like to handle the situation, and appellant said that he had to think about it. Sgt Enlow testified that he told appellant to let the finance office know as soon as possible, preferably, that very day.

DISCUSSION

This Court has applied the benchmark test for legal sufficiency established in *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). "The test for . . . [legal sufficiency of the evidence] is whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner,* 25 MJ 324 (CMA 1987), citing *Jackson, supra* at 319 99 S.Ct. at 2789. Writing in *United States v. Harper,* 22 MJ 157, 161 (CMA 1986), then-Judge Cox stated, "In this context, sufficient evidence generally means some legal and competent evidence from which a court-martial may find or infer beyond a reasonable doubt those facts required by law for conviction." *See also United States v. Pritchett,* 31 MJ 213, 216 (CMA 1990).

Until now, this Court has reserved the question of whether "a servicemember who accepts found money and who does nothing to correct the continued cash flow is not criminally liable. . . ." *United States v. Antonelli,* 43 MJ 183, 185 (1995), citing *United States v. Antonelli,* 35 MJ 122, 130-31 (CMA 1992) (Crawford, J., concurring in the result). However, we have made clear that "any *affirmative* action either to ensure the inappropriate continuation of the elevated allowances or to mislead officials in a way so as to co-opt a

recoupment has more than civil-indebtedness ramifications." *Antonelli,* 43 MJ at 185.

The mistaken delivery of property to an individual who realizes the mistake and simultaneously forms the intent to steal the property at the moment of receipt constitutes larceny at common law. W. LaFave & A. Scott, 2 *Substantive Criminal Law §* 8.2(g) at 342–43 (1986). Furthermore, where the individual does not realize the mistake at the time of receipt but realizes it later and then forms the requisite intent, there is a larceny as well. Para. 46c(1)(f)(i), Part IV, Manual for Courts-Martial, United States (1995 ed.)("Although a person gets property by a taking or obtaining which ... was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent."); *United States v. Aldridge,* 2 USCMA 330, 8 CMR 130, 1953 WL 1645 (1953); *United States v. Cox,* 37 MJ 543 (NMCMR 1993); *see also State v. Langford,* 467 So.2d 41 (La. App. 4th Cir. 1985). This latter larceny relies on the "fictional notion of *continuing trespass*" to find the concurrent existence of the taking element and the requisite intent. *LaFave & Scott, supra,* § 8.5(f) at 366.

We now hold that once a servicemember realizes that he or she is erroneously receiving pay or allowances and forms the intent to steal that property, the servicemember has committed larceny. Thus, the analysis in this case must focus on whether the evidence is legally sufficient to establish that appellant (1) realized he was mistakenly receiving housing allowances and (2) formed an intent to steal it. Giving proper deference to the military judge and the Court of Criminal Appeals, as well as viewing the evidence in the light most favorable to the Government, we hold that the evidence is legally sufficient to support appellant's conviction for larceny.

Sgt Sykes testified that appellant was present when she and Mrs. Helms discussed appellant's possible overpayment. In fact, she testified that she spoke directly to appellant and informed him to visit her at the finance office so that they could straighten the matter out. When Sgt Enlow told appellant that he had been overpaid, appellant did not appear surprised. The Court of Criminal Appeals, which has factfinding authority under Article 66(c), UCMJ, 10 USC 866(c), was "convinced that appellant knew he was receiving these allowances and was not entitled to them." Unpub. op. at 3. The lower court also noted that the more than $11,000 in housing allowances which appellant received amounted to about 40% of his pay. *Id.* Viewing this evidence in the light most favorable to the prosecution, a reasonable factfinder could have found beyond a reasonable doubt that appellant realized he was receiving unauthorized housing allowances.

The evidence is also legally sufficient to establish that appellant formed an intent to steal the housing allowances. The Court of Criminal Appeals found Sgt Sykes' testimony that she advised appellant to stop by the finance office credible. That court also found that appellant's failure to follow Sgt Sykes' advice was an "affirmative action designed to ensure the continuation of the allowances which he was not entitled to receive." *Id.* We agree. A reasonable factfinder could find that appellant's inaction, in light of Sgt Sykes' recommendation, constituted evidence of an "intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use...," which is required for a larceny conviction under Article 121(a)(1).

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judges SULLIVAN, GIERKE, and EFFRON concur.

Appendix B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SAMUEL T. HELMS II, FR254–5998
United States Air Force

ACM 31250

6 June 1996

Sentence adjudged 30 March 1994 by GCM convened at Rhein-Main Air Base, Germany. Military Judge: Bruce T. Brown (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 10 months, reprimand, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L Cohen and Maior Ormond R. Fodrea.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Colonel Thomas E. Schlegel, and Captain R. Scott Howard.

Before

DIXON, SCHREIER, and STARR
Appellate Military Judges

OPINION OF THE COURT

SCHREIER Senior Judge:

Contrary to his pleas, a military judge convicted appellant of stealing Basic Allowance for Quarters (BAQ) and

Overseas Housing Allowance (OHA) totalling about $11,000. Article 121, UCMJ, 10 U.S.C. § 921. The military judge acquitted appellant of the dishonorable failure to repay the stolen allowances. Article 134, UCMJ. The convening authority approved the adjudged sentence of a bad-conduct discharge, confinement for 10 months, reduction to E–1, and a reprimand. Appellant alleges the evidence is factually and legally insufficient to convict him of larceny. Finding no error, we affirm.

FACTS

Following assignment to Germany, appellant initially lived "on the economy" in non-government housing. While living on the economy, he received both BAQ and OHA. Military members who are not living in adequate government quarters receive these allowances. Appellant's allowances did not cover all his housing and transportation costs, so, after several months, he requested a move into government quarters which was granted in December 1992.

Appellant acknowledged that he was no longer entitled to BAQ once he moved into government quarters. A housing office representative testified that their standard procedure was to process the paperwork to finance to stop the housing allowances. However, for some unknown reason, this did not happen and appellant continued to receive the housing allowances for another 10 months. The error was discovered in October 1993 during outprocessing when appellant was separating from the Air Force. The amount of the overpayment was about $11,000.

Staff Sergeant Sykes, NCOIC of Customer Service in the Accounting and Finance office, testified that Mrs. Helms, appellant's wife, approached her informally during summer 1993 at a track meet. She said that Mrs. Helms indicated that she and appellant were concerned about a possible overpayment. Sergeant Sykes stated that appellant was

present during part of this conversation. She advised him to stop by Finance to find out if he was being overpaid and, if necessary, to work out a repayment schedule. This conversation took place about three months before the overpayment was discovered. There is no indication that appellant ever followed up on Sergeant Sykes' advice to stop by Finance to find out if there was an overpayment.

Mrs. Helms testified that after they moved into government quarters she assumed responsibility for their financial matters picking up all mail and paying all bills. She said that appellant never saw either his Leave and Earnings statements or any bank statements because she destroyed them after opening. She claimed that she never used a check register, but knew how much money they had and told appellant what was left after the bills were paid. Therefore, she stated that appellant had no knowledge of their income or any overpayment.

Mrs. Helms admitted that at some point she thought they might be overpaid because she realized they were receiving more money than their neighbors. She also verified the conversation with Staff Sergeant Sykes. However, she claimed that appellant was not present and that Sergeant Sykes told her appellant would have to come to the Finance office. However, at trial she could not remember if she ever discussed these matters with her husband.

SUFFICIENCY THE EVIDENCE

Trial defense counsel moved to dismiss the larceny charge for failure to state an offense, arguing that there is no duty to report an overpayment before the normal recertification process. The military judge denied the motion, finding that the specification stated an offense. Appellant renews his argument on appeal relying on this Court's decision in *United States v. Antonelli,* 37 M.J. 932 (A.F.C.M..R. 1993).

However, the Court of Appeals for the Armed Forces overturned this Court's 1993 decision. *United States v. Antonelli,* 43 M.J. 183 (1995); *see also United States v. Bulger,* 41 M.J. 194, 196 (C.M.A. 1994). The Court of Appeals for the Armed Forces restated its position that allowances paid to a service member for support, but which are not used for support, remain the lawful property of the United States.

The *Antonelli* decision was based on a case where the accused affirmatively falsified documents showing that he provided support for his dependents. Therefore, the Court left open the issue of whether an individual who passively, rather than actively, receives unauthorized allowances is also criminally liable for the offense of larceny. *See United States v. Antonelli,* 35 M.J. 122, 131 (C.M.A. 1992) (Crawford J., concurring in the result).

BAQ and OHA are paid to a member when adequate government quarters are not available. A member who lives in government quarters fails to meet the basic qualification for those allowances. Therefore, the member is not entitled to those allowances and they remain the property of the United States. *See United States v. Antonelli,* 43 M.J. at 184 (citations omitted); *United States v. Stadler,* — M.J. — (A.F. Ct. Crim. App. 8 May 1996).

Furthermore, we are convinced that appellant knew he was receiving these allowances and was not entitled to them. We find Mrs. Helms' statement that appellant had no knowledge of the overpayment unbelievable. Appellant received over $11,000 in ten months. This amounted to approximately 40% of his pay. This is not a case where the overpayment was insignificant or lasted only a short time. Additionally, we find Sergeant Sykes' testimony that she advised appellant to stop by Finance to determine if there was an overpayment credible. Appellant's failure to follow-up on

this advice was an affirmative action designed to ensure the continuation of allowances which he was not entitled to receive. We find that the evidence is factually and legally sufficient to find appellant guilty of larceny. *Jackson v. Virginia,* 443 U.S. 307 (1979); *United States v. Turner,* 25 M.J. 324 (C.M.A. 1987).

The findings of guilty and the sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Chief Judge DIXON and Judge STARR concur.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

Appendix C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANTHONY M. ANTONELLI, FR532–54–9447
United States Air Force

ACM 28856 (f rev)

19 January 1996

Sentence adjudged 19 May 1990 by GCM convened at Lowry Air Force Base, Colorado. Military Judge: Robert E. Sears and Robert N. Spencer.

Approved sentence: Bad-conduct discharge, confinement for 6 months, a fine of $10,000, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Lieutenant Colonel Joseph L. Heimann.

Appellate Counsel for the United States: Colonel Jeffery T. Infelise, Lieutenant Colonel Michael J. Breslin, and Major John H. Kongable.

Before

PEARSON, BECKER, and MORGAN
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

On May 19, 1990, court members convicted appellant of signing false official documents and stealing more than $100

in military pay allowances from the United States. The court sentenced him to a bad-conduct discharge, 6 months confinement, a fine of $10,000, and reduction to E–1, which the convening authority approved.

On appeal, appellant argued that a portion of the larceny conviction was not supported by the evidence and he was prejudiced by evidence of uncharged misconduct improperly admitted during sentencing. On April 19, 1991, we granted relief on both issues by modifying the larceny conviction to shorten the length of the offense and reassessing the sentence for it and the uncharged misconduct error. Reassessing, we disapproved the final in total. *United States v. Antonelli,* ACM 28856 (A.F.C.M.R. Apr. 19, 1991) (unpub.).

The government appealed that portion of our decision overturning the larceny conviction. On September 14, 1992, the Court of Military Appeals, now the Court of Appeals for the Armed Forces, set aside our decision on the larceny conviction and remanded the case to us for review in light of their opinion concerning the scope of the military's larceny statute. *United States v. Antonelli,* 35 M.J. 122 (C.M.A. 1992).

Once more, we considered the law and evidence and once again modified the larceny conviction to shorten the period of the offense and reassessed the sentence as we did before. *United States v. Antonelli,* 37 M.J. 932 (A.F.C.M.R. 1993). Once more, the government appealed. Once more, the Court of Appeals set aside our decision on the larceny conviction and remanded. *United States v. Antonelli,* 43 M.J. 183 (1995).

Today, we affirm the original findings of guilty adjudged on May 19, 1990, as we find the evidence legally and factually sufficient in accordance with the Court of Appeals' decision. *See United States v. Turner,* 25 M.J. 324 (C.M.A. 1987). We reassess the sentence only for the sentencing error, a point which the government did not appeal. Reassessing we

disapprove the fine in its entirety. See *United States v. Peoples,* 29 M.J. 426 (C.M.A. 1990). The findings of guilty and sentence, as reassessed, are correct in law and fact, and on the basis of the entire record, are

AFFIRMED.

OFFICIAL

ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator